Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

HOLLY GRACE WINGFIELD,

Petitioner,

-v-

NEVILLE MASSIE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

1. Was the evidence presented at Holly Wingfield's state trial for murder sufficient to satisfy the standard enunciated in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979)?

2. Can a federal appellate court sustain a state conviction on habeas review by making findings that conflict with the findings of the state jury?

3. Can a federal habeas appellate court uphold a state conviction despite the fact that the federal district court makes a specific factual finding that the jury's verdict was based on an improper legal standard and the appellate court fails to find that that factual finding was clearly erroneous?

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To: The Honorable Chief Justice and Associate Justices of the United States Supreme Court

Petitioner, Holly Wingfield, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on the 19th day of August, 1997.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published as Wingfield v. Massie, 122 F.3d 1328 (10th Cir. 1997). The opinion is attached as Appendix "A." The order of the Tenth Circuit denying rehearing was not published and is attached as Appendix "B." The judgement of the lower court which granted habeas corpus relief is attached as Appendix "C."

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 18, 1997. A timely petition for rehearing and suggestion for rehearing en banc was filed. The rehearing request was denied on September 10, 1997. Justice Breyer has subsequently granted Ms. Wingfield until January 8, 1998 to file her Petition for Writ of Certiorari. Jurisdiction of this Court is imposed pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend V provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. Amend XIV provides in pertinent part:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States;

> nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.

Okla. Stat. Ann. tit. 21, § 701.7A, the Oklahoma first degree murder statute provides:

> A person commits murder in the first degree when that person unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Okla. Stat. Ann. 21, § 172 provides:

> All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present are principals.

STATEMENT OF THE CASE

Holly Wingfield, at the age of sixteen, was charged with murdering her father, her stepmother and her eighteen-month-old sister, Crete. She was acquitted of murdering her father and stepmother. However, the Oklahoma jury convicted her of murdering her sister.

At the trial, the evidence showed that Holly's brother, Ty, then age nineteen, was the person who killed the members of the Wingfield family. Ty Wingfield had

pled guilty in order to avoid receiving the death penalty. The State of Oklahoma wanted two convictions so Holly was tried before a jury. Although Holly was the person on trial, the prosecution's case continually alluded to the actions of her brother.

During the opening statement, the state prosecutor said:

> The evidence will be that they talked and they didn't know what to do about Crete, the little two year old girl. Finally Ty made up his mind and he went and got the 22 and he called the baby and shot her.

(Tr. 278)(emphasis added)

At trial, Ty Wingfield admitted that Holly was not with him when their younger sister was killed. (Tr. 641) He testified that Holly had nothing to do with the killings:

> Q. Mr. Wingfield, to the best of your knowledge Holly Wingfield had nothing to do with these killings, did she?
>
> A. To the best of my knowledge.

(Tr. 661)

Ty Wingfield testified that Holly begged him not to kill Crete. (Tr. 662, 671) Various witnesses testified at trial that Ty Wingfield had consistently admitted that he alone was responsible for the killing of the child. (Tr. 306, 308, 331, 361, 391, 395, 405, 410, 420-21, 424-25, 425-26). Ty Wingfield also testified that he would have killed Holly but that he "[r]un out of bullets." (Tr. 676)

After being denied relief in the Oklahoma appellate court, Ms. Wingfield, pursuant to 28 U.S.C. § 2254 filed for habeas corpus relief in the United States District Court for the Northern District of Oklahoma, Case No. 96-C-255-K. The Honorable Terry C. Kern, Presiding Judge of the Northern District of Oklahoma, entered an order granting the writ of habeas corpus. Judge Kern ruled that the evidence was insufficient to sustain the murder conviction.

Judge Kern made extensive factual findings regarding the case. Among the relevant factual findings were the following:

> 1. Prior to the murders, Ty Wingfield admitted to using marijuana, crank, valium and alcohol.
>
> 2. Holly was present at the murders. At her brother's direction she help load the bodies on a truck and attempted to clean up the bloody mess in the house.
>
> 3. At her brother's instruction, Holly wrote two checks, one of which was apparently cashed.
>
> 4. Holly was instructed by her brother to follow him to the home of Joy Mauldin in Hawsville, Texas. It was Ty's idea to go to Texas because he had made arrangements to sell the truck in order to sell drugs. He needed Holly to drive the other vehicle.
>
> 5. At the preliminary hearing, Wendy Mauldin testified that Holly told her "she had Crete in the kitchen and Ty walked in there and she told Ty not to do anything but he called Crete into the other bedroom and she said she couldn't stop him."

6. Wendy Mauldin testified that Holly had told her that she was scared at the time her brother killed Crete.

7. At the May 20, 1988 deposition and at Holly's jury trial, Ty testified that he was told at the beginning of the case that unless he implicated his sister the State would seek the death penalty.

8. Following a seven day jury trial, Holly was acquitted of murdering her father and stepmother.

9. Ken Toon, a deputy sheriff from Texas, said that Ty admitted that he had killed Clint, Louise and Crete Wingfield.

10. Ty admitted that he had testified at the preliminary hearing that Holly had made some comments about killing the parents but only when she got mad, only as idle talk, but had never asked him, nor planned with him, to kill them.

11. Ty agreed that Holly had not encouraged him to shoot their father. He further admitted he misinterpreted Holly's statement whether he was "going to do it" because of his agitation and loss of control due to drugs.

12. Crete was killed outside the bedroom in the hallway. Holly was not with him at the time.

13. Ty admitted that it was his idea to go to Texas and that he needed Holly to drive the van to Texas so he could sell it. Ty also admitted that he directed Holly to write the checks that were cashed.

14. Ty told his uncle that Holly had begged him not to kill the child.

15. Ty said that Holly had discouraged him from killing the child, saying "No."

16. The prosecutor asked Ty why he had not killed Holly. He replied, "run out of bullets."

17. Donna Lewis testified that Holly had taken the child to the kitchen. Holly did not want Ty to kill Crete. Ty called for Crete and as the child walked around the corner, Holly heard a shot and "figured that Ty had killed Crete."

18. Crete went home to Ty on her own when Ty called her name.

19. While Ty may have ultimately told Holly that he would have to kill Crete, there was uncertainty about his intentions.

20. There was no plan or scheme between Holly and Ty to kill Crete Wingfield.

21. At the time Ty called for Crete, there was "still that glimmer of home" that Ty would not kill Crete.

22. The Wingfields lived in rural Craig County; no neighbors lived close by; Holly was scared and probably in shock; the killings all occurred in a short time span.

23. Holly's failure to show emotion after the killings is consistent with shock.

Most importantly, Judge Kern made a factual finding that the jury had based their verdict on impermissible factors. Judge Kern wrote:

> Whatever Petitioner did after the commission of the murders is not sufficient to convict her of aiding and abetting the murder of Crete. Even the jury was confused about the application of the law to the evidence of what Petitioner did after the commission of the murders. [The jury sent out a question] "If Holly had nothing at all to do with the actual killing of her dad, mother and sister, but consented to the disposing of the bodies, the cleaning up, putting the baby in the bag, packing and leaving -- not reporting Ty when they separated -- does this constitute abiding [sic] & abetting?"

Dist.Ct.Op. at 25-26.

Most importantly, Judge Kern made the following finding regarding the jury's verdict:

> [T]he evidence reveals that Petitioner wanted to protect Crete from the moment Ty shot his father. Petitioner grabbed Crete and ran to the living room, then to the kitchen where she tried to comfort Crete. When Ty told Petitioner he was going to kill Crete, she begged him not to kill the child. Even taking Ms. Randall's comments as true, there is still no evidence of a plan or scheme to kill Crete. The Court concludes from the jury's questions and the State's argument that the verdict of

> the jury may well have been based on the fact that Petitioner did nothing to save Crete's life. This, however, morally wrong, does not constitute first-degree murder under Oklahoma law.

Dist.Ct.Op. at 29 (emphasis in original)

The Tenth Circuit, despite Judge Kern's specific factual findings, reversed the grant of habeas corpus relief, saying that there was evidence to support the conviction:

> [W]e believe there was sufficient evidence from which a reasonable jury could have inferred that Holly had personally intended the death of Crete. First, Ty answered "yes" to the question, "Ty, prior to the time that your father and Louise and your little step sister were killed, was there any time that Holly talked to you about killing them? (emphasis added). Although the reference to "them" might have been intended to refer only to Clint and Louise, the most obvious meaning of the word "them" in the context of this question includes Crete, and the jury could have found from this testimony that Holly had intent to kill Crete when the murders occurred. Second, and most compelling, through the testimony of Sally Randall, that Ty told her he was going to kill Crete and that she then told Crete to "go to Ty." The jury could have found that statement to Crete was direct involvement by Holly intending to cause Crete's death. Third, there was ample evidence that Holly showed

> no remorse at the death of Crete and that she helped dispose of Crete's body. In conjunction with the other evidence, a jury could infer from Holly's lack of remorse that the killing of Crete was consistent with her intent and desires.

122 F.3d at 1333.

Ms. Wingfield sought en banc review. The request was denied. Ms. Wingfield now petitions this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

HOLLY WINGFIELD DID NOT MURDER HER SISTER; THE EVIDENCE SHOWED THAT HER BROTHER WAS GUILTY; THE TENTH CIRCUIT'S CONCLUSION THAT HOLLY KILLED HER SISTER IS INCONSISTENT WITH THE JURY'S FINDING THAT SHE DID NOT KILL HER MOTHER AND FATHER; THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH A DECISION OF THE NINTH CIRCUIT COURT OF APPEALS.

The Tenth Circuit's decision is in conflict with a decision from the Ninth Circuit Court of Appeals. In Mitchell v. Prunty, 107 F.3d 1337 (9th Cir. 1997), the State of California was attempting to show that a gang member had aided and abetted in a murder case when he let fellow gang members into his apartment with the knowledge that they intended to use it to facilitate a murder. The California

law is the same as the Oklahoma law with regard to being an aider and abettor.

The Ninth Circuit in Prunty rejected the argument. That court said, "[T]here is no way Mitchell could have admitted fellow gang members into his apartment with the intent to commit murder. Thus, even if Mitchell facilitated Judabean's murder by making the landing of his apartment building available to the assailants, this actus reus was not coupled with the necessary simultaneous mens rea." 107 F.3d at 1341 (footnotes omitted; emphasis in original). Here, assuming that Holly told Crete to "go to Ty", Holly's actus reus was not coupled with the necessary simultaneous means rea. She had no intent. She did not want her sister dead. Regardless of Holly's words, the child's fate was sealed. The Tenth Circuit ignored this argument in their opinion.

The Tenth Circuit's decision is in conflict with Mitchell v. Prunty in another respect. The opinion relies on a statement by Ty Wingfield that he and Holly had talked about killing them. That statement has no foundation. The jury rejected the conclusion that Holly had intended to kill her parents. She was found not guilty. Obviously, the jury did not give any factual credence to anything that led one to believe that she wanted to kill them. If this evidence was rejected as to the parents, so too must it be rejected with regard to Crete. In Mitchell, the Ninth Circuit said, "It is not reasonable to affirm a conviction based on testimony that is clearly rejected by the verdict." 107 F.3d at 1339 n. 3.

Holly was charged with murdering her parents. The jury found her not guilty. Obviously rejecting the idea that she had discussed killing them. Although this Court has sanctioned inconsistent verdicts, the Court should grant

certiorari here to discuss just how inconsistent verdicts can be. See United States v. Infelise, 813 F.Supp. 599 (N.D. Ill. 1993)(inconsistent verdicts may require setting aside a conviction where those verdicts are based on charges with "virtually identical elements"). The Tenth Circuit's failure to consider the jury's findings with regard to the other charges as proof of Holly's innocence justifies review of this case.

II.

A JURY'S VERDICT CANNOT BE UPHELD WHEN A DISTRICT COURT'S FINDING THAT AN IMPERMISSIBLE FACTOR WAS THE BASIS OF THE VERDICT AND THE FINDING HAS NOT BEEN FOUND TO BE CLEARLY ERRONEOUS.

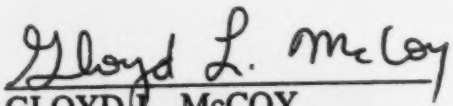
The district court judge made a factual finding that the Oklahoma jury found Holly guilty because they felt she owed a duty to try and save Crete Wingfield. Dist.Ct.Op. at p. 24-25. The Tenth Circuit opinion did not address this important finding. Holly had no legal duty to protect her sister. See Knox v. Commonwealth, 735 S.W.2d 711 (Ky. 1987); Pope v. State, 396 A.2d 1054 (Mass.App. 1979). A person cannot be lawfully convicted under the standards of due process if there was no violation of any duty.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Habeas Corpus be granted. This Court's duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though the Court's labors may not provide posterity with a newly minted rule of law.

Kyles v. Whitley, 514 U.S. 419, 455, 115 S.Ct. 1555 (1995)(Stevens, J., with whom Ginsburg, J. and Breyer, J., join). A review of this case's facts should show that, as expressed by the district court judge in this case, Ms. Wingfield is not guilty of the crime of murder.

Respectfully submitted,
COYLE & McCOY



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APPENDIX "A"

Filed August 19, 1997
United States Court of Appeals
Tenth Circuit
Patrick Fisher, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Case No. 97-5020

HOLLY GRACE WINGFIELD,
Petitioner - Appellee,

-v-

NEVILLE MASSIE, Warden,
Mabel Bassett Correctional Center,
Respondent - Appellant.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 96-C-255-K)

Gloyd L. McCoy of Oklahoma City, OK (J.W. Coyle, III of Oklahoma City, OK, with him on brief) for Petitioner-Appellee.

Alecia A. George, Assistant Attorney General of Oklahoma, for Respondent-Appellant.

Before **ANDERSON, BALDOCK**, and **EBEL**, Circuit Judges.

EBEL, Circuit Judge

Respondent-Appellant Neville Massie, as Warden of the Mabel Bassett Correctional Center (the "State"), appeals the district court's grant of a writ of habeas corpus to Petitioner-Appellee Holly Wingfield ("Petitioner" or "Holly"). The district court granted the writ after determining that Petitioner had been convicted of murdering her eighteen-month old sister, Crete, upon constitutionally insufficient evidence. We granted the State's application for a stay of the district court order pending this appeal, and we now exercise jurisdiction under 28 U.S.C. §1291 (1994) and reverse.[1]

BACKGROUND

On the morning of August 23, 1987, Clint and Louise Wingfield left their home in rural Craig County, Oklahoma, to attend worship services at their church. Clint and Louis took their eighteen-month old daughter, Crete, with them, but left their eighteen-year old son, Ty, and their sixteen-year old daughter, Holly, at home. While their parents were at church, Ty and Holly drove one of the family's cars to Miami, Oklahoma, in search of Valium and alcohol. Their search was successful, allowing Ty to consume twenty-three Valium pills and the majority of a six pack of beer. Holly took two Valium pills and consumed three beers. The night before Ty had also taken 50 Valium pills, injected several doses of methamphetamine into his body with a needle, and smoked large quantities of marihuana.

---

[1]We note that Holly filed her habeas petition in the district court on April 3, 1996, three weeks prior to the April 24, 1996, effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214. Thus, AEDPA does not apply to this action. See Lindh v. Murphy, 117 S.Ct. 2059, 2068 (1997).

Also on Sunday morning, Ty noticed that his parents had locked the telephone in their room so that it could not be used. Ty was so angry about this that he kicked in the door to access the phone. When Clint, Louise, and Crete returned home, an argument ensued about the door. Ty explained that he broke the door so that Holly could use the phone to make arrangements to go to the lake. Clint then told Holly she was not allowed to go to the lake or anywhere else.

During this argument, Ty obtained a rifle from the hall closet and confronted Clint with it. After declaring that he would not undergo drug rehabilitation, as Clint had commanded a couple of days before, Ty shot Clint with the rifle. Holly grabbed Crete and took her into the living room after hearing the shot. Holly then returned to her parents' bedroom, where she saw Ty shoot Louise. She also observed Ty hit Clint twice on the head with a steel bat, apparently because he was still alive after the initial gun shot wound.

Thirty minutes later, when Holly was getting Crete something to drink in the kitchen, Ty called for Crete. Holly told Crete to "go to Ty", and Ty then shot Crete with the rifle. Holly then placed Crete in a plastic bag, and helped Ty place the three bodies in the family pickup truck. While Ty took the bodies to the dump, Holly attempted to clean up all the blood that was in the house. She also gathered some valuables, and forged two checks to Ty. When Ty returned from the dump, the two fled to Texas in separate vehicles. Ty drove the family truck, and Holly drove the family van with the plan that the van be sold for drug money. Ty and Holly planned to meet in Hawsville, Texas, at the home of Joy Mauldin, the mother of Ty's ex-girlfriend.

Late that night, Holly got lost in Paris, Texas, and went to the police station to ask for directions to Hawsville. Ty had arrived at Mauldin's house at 3:30 a.m., and had informed Mauldin of the murders. Mauldin then called the local police, who came to Mauldin's house to arrest Ty. Holly showed up at the Mauldin house at around 6:30 a.m., at which time she was taken by law enforcement to Marshall, Texas for questioning. She was ultimately arrested for her involvement in the murders.

Although Holly was sixteen at the time of the murders, she was charged as an adult under Oklahoma's Reverse Certification procedure for the murders of Clint, Louise, and Crete. At trial, the State sought to convict Holly under an aiding and abetting theory, as Ty had already pled guilty as the principal for all three murders. The State relied predominately upon the trial testimony of three figures to show that Holly had aided and abetted Ty in the murders: Ty Wingfield, Joy Mauldin, and Sally Randall, Holly's second cousin. The state also relied upon Holly's own affidavit, which was produced the day after the murders during an interview with Texas law enforcement.

Ty testified at trial that prior to the day of the murders Holly had suggested to him on several occasions that they kill, Clint, Louise, and Crete. Ty recounted that Holly was particularly frustrated with living at home on the day of the murders and that that morning Holly suggested to him that they kill their family when they got back from church, take the van, and leave. Ty also testified that when he went to retrieve the rifle he used to commit the murders from a closet, Holly encouraged him by asking "are you really gonna do it this time?," and then repeatedly saying "are you gonna do it, are you gonna do it." Ty testified that at one point when he and Louise were struggling over the

rifle, Holly hit Louise on the back of the head with a steel baseball bat. Ty also confirmed that after the murders, Holly put Crete's body in a plastic bag and helped him load all three bodies into the truck. Finally, Ty explained that Holly cleaned up the house and forged two checks to him from Clint's account before they fled to Texas.[2]

Sally Randall testified at trial regarding a conversation she had with Holly in the Rogers County jail on February 14, 1988. Holly admitted to Randall that Ty had told her that he was going to kill Crete immediately before she told Crete to "go to Ty." Randall also explained that Holly showed no remorse when she recounted the details of the murders, including her placement of Crete in a bag to be taken to the dump.

Joy Mauldin testified at trial regarding various statements made by Holly on the night she arrived at her house. Mauldin testified that Holly expressed no emotion with regard to Crete's death. Additionally, Mauldin testified that Ty told her that "he told Holly that [he was] going to take the blame for everything and for [Holly] not to say anything."

Finally, the State relied upon Holly's own affidavit to show that Holly aided and abetted in the murders of Clint, Louise, and Crete. In that affidavit, produced the day after the murders, Holly declared that although she did not want Ty to kill Crete, she knew Ty was going to kill Crete when

---

[2]At trial, Ty could not recall many of the events surrounding the murders. Thus, much of Ty's testimony came in through the State's refreshing of Ty's memory with testimony he had earlier given under oath at a preliminary hearing. Ty admitted to remembering his earlier testimony, and testified that such testimony was true.

Crete left the kitchen because Ty told her he was going to kill her. Holly also admitted in the affidavit that she placed Crete in a plastic bag after the murders and helped Ty clean up.

After a lengthy deliberation with regard to this, and other, evidence, the jury convicted Holly of aiding and abetting in the murder of Crete, and acquitted her on the charges of aiding and abetting in the murders of Clyde and Louise. Holly was then sentenced to life in prison. The Oklahoma Court of Criminal Appeals affirmed the conviction and sentence on August 17, 1994, by summary opinion. A petition for rehearing was subsequently denied.

On April 3, 1996, Holly filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Oklahoma pursuant to 28 U.S.C. § 2254 (1994)(amended 1996). On February 7, 1997, the district court granted habeas relief on the grounds that Holly was convicted upon constitutionally insufficient evidence. We granted the State's motion for a temporary stay of the district court order and expedited this appeal. We now exercise jurisdiction under 28 U.S.C. § 1291 (1994) and reverse.

DISCUSSION

"A district court decision setting aside a jury verdict of guilty is entitled to no deference on appeal, and we review that determination *de novo*." United States v. Santistevan, 39 F.3d 250, 255 (10th Cir. 1994)(citations and quote marks omitted). The standard of review, as enunciated by the Supreme Court, is "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. 307, 319 (1979)(emphasis in original). This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basis facts to ultimate fact." Id. We have emphasized that, under Jackson, our "review is 'sharply limited' and a court 'faced with a record of historical facts that supports conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" Messer v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996) (quoting Wright v. West, 505 U.S. 277, 296-97 (1992)).

In evaluating the evidence presented at trial, we are not to weigh conflicting evidence or consider witness credibility. Id. Instead, we must view the evidence in the "light most favorable to the prosecution," Jackson, 319 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1987). On the other hand, we can only affirm the conviction if the evidence supporting the conviction is "substantial" and does "more than raise a mere suspicion of guilt." Beachum v. Tansy, 903 F.2d 1321, 1332 (10th Cir.), cert. denied, 498 U.S. 904 (1990).

In applying the Jackson standard, we look to Oklahoma law to determine the "substantive elements" of the relevant criminal offense. See 443 U.S. at 324 n.16. The Oklahoma first degree murder statute provides:

> A person commits murder in the first degree when that person unlawfully and with malice aforethought causes the death of another

> human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Okla. Stat. Ann. tit. 21, § 701.7.A (West Supp. 1997). Additionally, Oklahoma law provides that persons "concerned in the commission of crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals." Okla. Stat. Ann. tit. 21, § 172 (West 1983).

The Oklahoma Court of Criminal Appeals has specified that in order to convict an aider and abetter as a principal in a first degree murder prosecution, the prosecution must prove: (1) that the defendant personally intended the death of the victim; and (2) that the defendant aided and abetted with full knowledge of the perpetrator's intent. Johnson v. State, 928 P.2d 309, 315 (Okla. Crim. App. 1996), petition for cert. filed, (May 22, 1997). Oklahoma has further elaborated on the range of conduct for which a conviction for aiding and abetting may be sustained, stating that "'[a]iding and abetting' involves acts, words or gestures encouraging the commission of the offense, either before or at the time of the offense." VanWoundenberg v. State, 720 P.2d 328, 333 (Okla. Crim. App.), cert. denied, 479 U.S. 956 (1986). Moreover, "mere mental assent to or acquiescence in the commission of a crime by one who did not procure or advise its perpetration, who takes no part therein, gives no counsel and utters no word of encouragement to the perpetrator, however wrong morally, does not in law constitute such person a participant in the crime." Turner v. State, 477 P.2d 76, 83 (Okla. Crim. App. 1970)(quotation omitted). Applying the evidence produced in this case to the elements of aiding and abetting

as defined by the Oklahoma courts, we believe there was constitutionally sufficient evidence from which a rational jury could have found Holly guilty of aiding and abetting in the murder of her sister, Crete.

The district court conceded that the State had produced sufficient evidence concerning the second prong of Johnson --that the defendant aided and abetted with full knowledge of the companion's intent to kill the victim. However, the district court granted Holly habeas relief after determining that the State produced insufficient evidence of the first prong of Johnson -- that the defendant personally intended the victim's death. We respectfully disagree.

Although "[t]he meaning of the word "intent" in the criminal law has always been rather obscure," 1 Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law, § 3.5, at 302 (1986), there are a few guideposts we can rely upon in our present inquiry. First, a jury is permitted to draw inferences of subjective intent from a defendant's objective acts. See Id. at 316-17. Thus, even when a defendant, as here, denies having the requisite intent, a jury may disbelieve the defendant "if [her] words and acts in the light of all the circumstances make [her] explanation seem improbable." Id. at 318. Second, a jury is permitted to find that a defendant intends those consequences which he announces a desire to accomplish. See Johnson, 928 P.2d at 315 (finding that there was sufficient evidence that the defendant intended the death of a victim where the defendant announced prior to the death of the victim how and why he would kill the victim and where the defendant executed the murder in the announced manner).

Applying these guidelines, we believe there was sufficient evidence from which a reasonable jury could have

inferred that Holly personally intended the death of Crete. First, Ty answered "yes" to the question, "Ty, prior to the time that your father and Louise and your little step sister were killed, was there any time that Holly talked to you about killing them?" (emphasis added). Although the reference to "them" might have been intended to refer only to Clint and Louise, the most obvious meaning of the word "them" in the context of this question includes Crete, and the jury could have found from this testimony that Holly had stated an intent to kill Crete before the murders occurred. Second, and most compelling, Holly admitted, through the testimony of Sally Randall, that Ty told her he was going to kill Crete and that she then told Crete to "go to Ty." The jury could have found that statement to Crete was direct involvement by Holly intending to cause Crete's death. Third, there was ample evidence that Holly showed no remorse at the death of Crete and that she helped dispose of Crete's body. In conjunction with the other evidence, a jury could infer from Holly's lack of remorse that the killing of Crete was consistent with her intent and desires.

Despite this evidence, the district court found that there was "no evidence that Petitioner knowingly and intentionally intended the death of Crete." The district court noted that Holly "did not give Ty the shotgun, did not encourage him to shoot, or in any other obvious way assist him in shooting Crete." The district court found no significance in Ty's testimony that Holly had suggested to him the morning of the murders that they kill "them" after finding that Holly had only suggested that they kill the parents. The district court also observed that Holly testified in her affidavit that she told Ty not to kill Crete, and that her act of taking Crete into the kitchen during Ty's fight with his parents "seem[ed] to negate any inference of premeditation or deliberation on the part of [Holly]

concerning Crete's death." Finally, the district court explained that the evidence of Holly's post-murder cooperation with Ty was not sufficient to convict her of aiding and abetting in the murder of Crete.

We agree with the district court that there are certain pieces of evidence in the record that could support a finding that Holly did not intend the death of Crete. However, we have explained that when a record allows for conflicting findings, we "must presume . . . that the trier of fact resolved any such conflicts in favor of the prosecution. . . ." Messer, 74 F.3d at 1013 (quotation omitted). Moreover, we review the record as a whole in an insufficiency challenge. See Beachum, 903 F.2d at 1332 (noting that we view "all of the evidence presented at the trial"). After reviewing the evidence as a whole, and in the light most favorable to the prosecution, we believe a rational jury could have found that Holly intended the death of Crete, and thus, that Holly was guilty of aiding and abetting Ty in the murder of Crete.

CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of habeas corpus.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
Case No. 97-5020

HOLLY GRACE WINGFIELD,
Petitioner - Appellee,

-v-

NEVILLE MASSIE, Warden,
Mabel Bassett Correctional Center,
Respondent - Appellant.

ORDER
Filed September 10, 1997

Before **ANDERSON, BALDOCK**, and **EBEL**, Circuit Judges.

Appellee's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed.R.App.P.35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: s/Trish Osgood
Deputy Clerk

APPENDIX "C"

Filed February 7, 1997
Phil Lombardi, Clerk
U.S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOLLY GRACE WINGFIELD,	)	
	)	
Petitioner,	)	
vs.	)	No. 96-255-K
	)	
NEVILLE MASSIE,	)	
	)	
Respondent.	)	

ORDER

Before the Court for consideration is the petition for a writ of habeas corpus of Petitioner Holly Grace Wingfield. Petitioner, represented by counsel, challenges her first-degree murder conviction from Craig County District Court, Case No. CRF-87-891, on the ground of insufficient evidence. Also before the Court is Petitioner's motion for oral arguments. (Docket #14)[1] As more fully set out below, the Court finds that the petition for a writ of habeas corpus should be granted and the motion for oral argument should be denied.

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[1] Numbers in parentheses refer to court documents: federal court docket sheet (Docket #); statement of Holly Wingfield (Stmt.); original State court record (O.R.); transcript of preliminary hearing (P.Tr.); transcript of motion hearing (M.Tr.); transcript of Reverse Certification Hearing (R.C.H.) and transcript of jury trial (Tr.).

I. BACKGROUND AND PROCEDURAL HISTORY

Holly Grace Wingfield [Holly] was charged as an adult under Oklahoma's Reverse Certification procedures, and on November 19, 1998, was sentenced to life imprisonment for the death of Crete Wingfield [Crete], her adopted 18-month old sister. (O.R. 327)

The charges against Holly arise from events which transpired on Sunday, August 23, 1987. Ty Wingfield [Ty], Petitioner's brother, testified he killed his father, Clint Wingfield, and step-mother, Louise Wingfield, and sister, Crete Wingfield, during the early afternoon at their rural home in Craig County, Oklahoma.

In the days preceding the homicides, Ty admitted to using marijuana, "bathtub crank," Valium, and alcohol. The night before the murders, Ty admitted taking 500mg of Valium, "shooting up" crank, and smoking pot all night. The next morning (the day of the murders) Ty obtained a 6-pack of beer and 25 more Valium tablets. He admitted to drinking most of the beer and taking all but two of the Valium. (Tr. 610.) Holly admitted to drinking a couple of beers and taking two 5mg Valium tablets. (Tr. 612.)

The record indicates Holly was present during the murders, helped her brother load the bodies on the family truck, and, at Ty's instruction, attempted to clean the bloody mess int he house. Again at Ty's instruction, Holly wrote two checks, one of which was apparently cashed. Holly was instructed by Ty to follow him to the home of Joy Mauldin in Hawsville, Texas. It was Ty's idea to go to Texas where he had already made arrangements to sell the truck in Longview, Texas, for cocaine and heroin, and he needed Holly to drive the other vehicle. (O.R. 651.)

Around 3:30 a.m. on Monday morning, Ty arrived at the home of Joy Mauldin, whose daughter he had once dated. Holly "got lost" in Paris, Texas, and did not arrive until around 6:30 a.m. Mrs. Mauldin eventually notified the county officials, and both Ty and Holly were arrested. Holly and Ty were sixteen and nineteen years old, respectively, at the time of their arrest.

A preliminary hearing was held October 19-22, 1987. Among those who testified was Wendy Mauldin, Ty's former girlfriend. She testified that Holly had told her "she had Crete in the kitchen and Ty walked in there and she told Ty not to do anything but he called Crete into the other bedroom and she said she couldn't stop him, she didn't try to stop him." (P.Tr., p. 23.) When questioned about why Holly didn't try to stop Ty, Wendy testified Holly was scared. (P.Tr., p. 23) Holly admitted to Wendy that she had helped remove the bodies from the house, but had stayed at the house, attempting to clean the stains from the carpet. (P.Tr., p. 33)

Initially, Ty pled not guilty, but on January 20, 1998, Ty withdrew his plea and entered a guilty plea to all three murders. (O.R. 260.) The state court judge sentenced Ty to life imprisonment on each Count, with the sentence in Count 3 to run consecutive to concurrent life sentences in Counts 1 and 2. (O.R. at 246, 283-288).

During the latter part of March, 1988, Ty contacted Holly's attorney and asked him to come to Granite Reformatory. (Tr. 635-637.) Ty expressed a desire to "make a clean break of everything." Ty gave a recorded statement and agreed to a deposition. At the May 20, 1988 deposition and at Holly's jury trial, Ty testified that he was told from the beginning of this case that unless he implicated

his sister Holly the State would seek the death penalty. (Deposition TR. at 25; and Tr. at 656, 659-60.) Ty refused to testify at this deposition or at Holly's trial when asked about the death of Crete and instead claimed immunity under the Fifth Amendment.

Finally, on September 19, 1998, following a 7-day jury trial in which Ty Wingfield testified on behalf of the State and against his sister, Holly was acquitted of murdering her father and stepmother, but was found guilty of aiding and abetting Ty in the killing of their sister, Crete. In accordance with the jury verdict, Petitioner was sentenced to life imprisonment and she appealed. On August 17, 1994, the Court of Criminal Appeals affirmed the conviction and sentence by summary opinion. Wingfield v. State, Case No. F-89-0480 (Unpublished Opinion). (Attached as Ex. A to Respondent's Response, Docket #12). Petitioner then filed a petition for rehearing which was denied by the Court of Criminal Appeals.

The evidence at trial reveals the following as to the murder of Crete Wingfield.

Barry Tullis, a neighbor of the Wingfields in rural Craig County, testified that on August 23, 1987, around 2:30 p.m., he went to the Wingfield's home to borrow a trailer. (Tr. 288-295.) As he approached the home, Tullis saw Ty running out of the garage door. A flat bed pickup was parked close to the doorway and Ty had blood on his clothes, legs and hands. Tullis told Ty he wanted to borrow a trailer, so they walked a short distance from the house to see if it was in the field. After checking for the trailer, they walked back to the house, where Holly had come outside. Tullis testified that Holly had blood on her shoes, "cause she ask [sic] me how to get blood out...she pointed them out to

me...oh,...just a little blotch here and there." Holly told him that the blood was from squirrels they had been cleaning. (Tr. 291-292.)

Joy Mauldin, a resident of Hawsville, Texas, and mother of Ty's former girlfriend Wendy, testified that Ty fled the murder scene and drove to her house in Texas. Ty had arrived about 3:30 a.m., although he had originally called around 11 to 12 midnight from Longview, Texas. After talking to her daughter, Ty confessed to Mrs. Mauldin that he had killed his father and stepmother. When asked what Ty said about Crete, she testified Ty "said he short her too." (Tr. 308.) Mrs. Mauldin then contacted the local police and Ty was arrested. (Tr. at 310-311.) As the police were arresting Ty, which was around 6:30 a.m., Holly arrived at the Mauldin's home. The police instructed Mrs. Mauldin to bring Holly to Marshall, Texas, for questioning. Mrs. Mauldin testified that Holly showed no emotion but seemed calm. (Tr. at 312, 316.)

John Woodall, jailer and night dispatcher for Craig County Sheriff's Department, testified he received a report from law enforcement officials in Hawsville, Texas, about a triple homicide near Welch, Oklahoma. He notified his brother, Jack, a deputy, who notified the sheriff. (Tr. 335-36.)

Jess Walker, Sheriff of Craig County, testified that after receiving the homicide report, he went to the Wingfield's home around 7:00 a.m. He and other deputies found blood at the home, secured the crime site, and subsequently discovered the location where the bodies were dumped. (Tr. 339-46). On cross examination, Walker disclosed that the phone call from jailer John Woodall implicated only Ty Wingfield in the murders. (Tr. 361.)

Dr. O.W. Dehart, a physician employed as a county medical examiner, testified regarding his examination and identification of the bodies at the dump site. (Tr. 368-378.)

Carey Thurman, an agent the Oklahoma State Bureau of Investigation (OSBI), testified as to the investigation of the crime scene, the type of guns, and other weapons. (Tr. 387-88.)

Clay Medrano, City Marshall for Hawsville, Texas, testified that Ty confessed killing his father with a rifle and his stepmother with a pistol. (Tr. 391.) Once at the police station, Ty informed Medrano of the location of the bodies. (Tr. 395-96, 401). On cross examination, Medrano testified that Ty admitted killing his family, including baby sister Crete. (Tr. 405.)

Ken Toon, a deputy sheriff in Harrison County, Texas, took the stand next and reiterated that Ty admitted killing his family.

> Q. What did he (Ty) tell you?
>
> A. His story he told us was that his father, step mother and step sister had come home from church and that he father and Holly had got [sic] into an argument, something about she was suppose [sic] to have done the dishes and didn't do it and wanted to wait till tomorrow, and they got in an argument about that and he tried to confront his father at that time, and his father sent him to his room and he

went to his room and came back out, I believe he stated that he went to a bathroom and retrieved a rifle and took it back out and shot his father.

Q. Anything else?

A. He stated that after that he had shot Louise, his step mother, and then he shot Crete.

(Tr. 410.) Toon provided similar testimony on cross examination. (Tr. 424-26)

Dr. Robert Hemphill testified he conducted the autopsy on the bodies of Louise and Crete Wingfield. (Tr. 430-39.) The cause of Crete's death was "the gunshot wound to the head." (Tr. 439.)

Arnold Bentz, criminalist supervisor with OSBI, examined the vehicles driven by Ty and Holly to Texas and picked up evidence from officers in Texas, including the suitcases, weapons, the TV and VCR which were found in one of the vehicles. (TR. 452-487)

Phill Neff, member of the Church of Jesus Christ of Latter Day Saints, testified that Clint, Louise and Crete Wingfield attended services on Sunday, August 23, 1987, from 10:00 a.m. to 1:00 p.m. and left the church about 1:45 p.m. (Tr. 487-88.)

Dr. Mohammed Merchant then testified regarding the autopsy of Clint Wingfield. (Tr. 490-99.)

Dennis Reimer, criminalist with OSBI, testified about the evidence gathered at the Wingfield's residence and, in particular, the examination of blood stains in and around the house. (Tr. 499-565).

Connie Layton, owner of a convenience store in Welch, testified that on August 23, 1987, Ty had come to her store to cash a check for $150.00 supposedly signed by Clint Wingfield. (Tr. 566-69)

James Looney, forensic ballistics examiner with OSBI, testified regarding the bullets and firearms. (Tr. 572-77.)

The State then called **Ty Wingfield**, Petitioner's brother. Ty admitted having a long history of heavy drug abuse which started in the latter part of 1985. He testified he used marijuana, methamphetamine, cocaine, barbiturates, heroin and alcohol. (Tr. 600-602.) In early 1987, he spent 8 weeks in the Navy but exaggerated a back injury in order to receive a discharge and return to his drug habit. (Tr. 601-602, 643-44). Just a few days prior to the murders, Ty had been confronted about the drug paraphernalia his dad had found in Ty's room. The father had also threatened to send Ty to a drug rehab program. The night before the murders, Ty admitted he had taken 500mg Valium and shot up "approximately two and a half grams" of crystal.[2] He did not go to sleep that night but stayed awake, smoking pot. (Tr. 602, 612-13, 644-45).

The next morning after his parents left for church, Ty decided to drive to Miami, Oklahoma to pick up more

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[2] Crystal or "bathtub crank" is a clandestinely manufactured methamphetamine or amphetamine.

Valium tablets and beer. He awakened Holly and took her with him. He testified he obtained 25 more Valium tablets and drank most of a six-pack. (Tr. 610, 613, 644.) He further testified Holly took two Valium tablets (of the 25) and drank "maybe one" beer on Sunday morning. (Tr. 645.)

Although Ty testified he did not remember whether he and Holly had any specific conversations regarding the killings, the State impeached Ty's statement at the trial with his testimony from the preliminary hearing. Ty testified he and Holly had talked about his drug problem, about their Dad finding some of Ty's drug paraphernalia, about the possibility of Ty going to drug rehabilitation, about the bedroom door being locked and the phone restrictions, about taking the van and leaving, and having to kill the parents in order to do that. (Tr. 603-608.) On cross examination, Ty finally admitted testifying at the preliminary hearing that Holly had made some comments about killing the parents but only when she got mad, only as idle talk, but had never asked him, nor planned with him, to kill them. (Tr. 648; R.C.H. 10).

Ty did not remember at whose request he kicked in his parents' bedroom door, but the State again impeached him with preliminary hearing testimony. On the witness stand Ty stated he was angry because the parents locked the bedroom door to prevent Holly from using the phone. He became enraged and violently kicked it open. (Tr. 609-610, 615, 652.) After the parents returned home, Ty testified there was an argument about the door. (Tr. 652.) According to Ty, he started down the hallway to the back room, "to get a gun," and said that Holly made some kind of remark, like, "was he really going to do it," or something like that. Although he could not recall whether or not Holly tried to persuade him not to do it, his preliminary hearing

testimony indicated Holly "did not do anything"..."did not encourage him." (Tr. 615-617.) On cross examination, Ty agreed that Holly didn't encourage him to shoot his father. "I can't say she did, no." (Tr. 654.) He further admitted he misinterpreted Holly's statement whether he was "going to do it" because of his agitation and loss of control due to drugs. (Tr. 655.)

Ty admitted shooting his father, but took the Fifth amendment when questioned about killing Louise and Crete. He was uncertain about the exact time Crete was killed, but did state she was killed after the murder of his father and stepmother. He remember Holly had taken Crete into the kitchen. (Tr. 618-21, 640-41.) Ty testified he tried to comfort Crete. "I don't recall exactly what was going through my mind at the time." (Tr. 641.) He testified Crete was killed outside the bedroom in the hallway, and Holly was not with him at the time. (Tr. 641.) He could not remember, however, whether or not he had told Holly he was going to kill Crete. (Tr. 642.)

Ty testified that Holly worked the "comealong" to help him load the bodies on the truck. (Tr. 628-29). He further admitted taking the bodies on a flat bed truck to a dumping area not too far from the house, and directing Holly to clean the house, write two checks, and take all the jewelry. (Tr. 618-21.) He admitted loading a TV but denied that Holly loaded the VCR. The State, however, impeached him with a statement from the preliminary hearing that Holly had loaded the VCR. (Tr. 625.) On cross examination he admitted it was his idea to go to Texas and that he needed Holly to drive the van to Texas to sell it, along with the TV and the VCR. (Tr. 651, 653.) Ty also testified that he cashed the checks which he directed Holly to write.

On cross-examination, Ty testified that Holly had nothing to do with the killings and that they were the result of his agitation due to drug intoxication. He testified his state of mind was such that he did not "really care about anything" (Tr. 651) and that he had become so enraged and out of control when he discovered that the parents had locked their bedroom door. He stated that he could not think of anything other than his father' threats to send him to drug rehabilitation. (Tr. 654.) He further testified that he told his uncle, Floyd Cress, that Holly was in the kitchen with Crete and she had begged him not to kill the baby, but that Ty had to kill her "because the only other thing that I could think of to do with her, was sell her." (Tr. 661-663.) On re-direct, Ty testified that at the time he shot his father he had not planned to kill Crete. He stated that when he was thinking whether or not to kill Crete, Holly discouraged him by saying "No." (Tr. 676.) The prosecutor asked Ty why he did not kill Holly; Ty responded that he had "run out of bullets." (Tr. 676.)

Ty admitted giving an unsworn statement to Petitioner's counsel and an investigator in March of 1988 at Granite Correctional Center. (Tr. at 636.)

Sally Randall, cousin of Clint Wingfield, testified about her conversation with Holly at the Rogers County Jail on or about February 14, 1988. She testified Holly admitted helping load the bodies on the truck; that Holly "told Crete to go to Ty;" and that Holly placed Crete in a bag. (Tr. 696, 702.) She admitted that she had not been around her cousin and his family on a regular basis over the past three years. (Tr. 695-696.)

Donna Lewis, deputy sheriff with the Harrison County Sheriff's department, testified about the statement

which Holly gave the morning after the murders. (Tr. 725, 727-28.) Mrs. Lewis wrote out Holly's statement of what transpired. She testified Holly told her that Holly and Ty went to Miami, Oklahoma, to buy some Valium and beer, the majority of which Ty consumed. Holly said she took 2 of 25 Valium tablets and drank some beer. They returned to the house around 1:20 p.m., shortly before their parents and little sister returned from church. Their father discovered the bedroom door had been kicked in and wanted to know the reason. Ty told him that he broke it because Holly wanted to use the phone to make arrangements to go to the lake. The father told Holly she wasn't going anywhere. Ty then grabbed a long rifle and went to his parent's bedroom where he told their dad he [Ty] would not be going to drug rehabilitation. After hearing a shot, Holly went into the parents' bedroom, grabbed Crete and took her to the living room. (Tr. 733.) She then went back to the parents' bedroom where she saw Ty and Louise fighting and Ty shot Louise. Ty then picked up a small bat and hit the father twice because he was still alive.

Lewis testified Holly recalled she then took Crete to the kitchen and asked her if she wanted something to eat or drink. Holly said Ty had told her he was going to kill Crete too, although she did not want to kill Crete. (Tr. 736). Ty then called Crete and Crete went to Ty. As Crete walked around the corner to the bedroom, Holly heard a shot and "figured that Ty had killed Crete." (St.Ex. 137, p.2; Tr. 736.) Ty came to the kitchen and told Holly that he hated having to kill Crete but that he had to do it. (Tr. 736.)

Continuing, Lewis testified Holly said that Ty hold her to get some bags and start cleaning up; so she put Crete in a white trash bag and laid her beside her Dad on a blanket. (Tr. 737.) Ty then dragged the bodies to the truck

and loaded them, getting Holly to work the "comealong." (Tr. 731-38, 741.) While he disposed of the bodies, Ty told Holly to "clean things up." Holly tried to clean the carpets and walls. (Tr. 739.) Ty told Holly to pack her clothes, to get the rings off Louise and whatever money she could find. (Tr. 741.) Ty then took a shower and threw some things in the flatbed truck. The TV and VCR were loaded in the van. He told Holly to write two checks one for $200 and the other one for $150, which he was able to cash at the small convenience store. They fled the house about 4:30 in the afternoon. As they were driving toward Hawsville, Texas, Holly and Ty were separated. Holly got lost in Paris, Texas, and stopped at a police station. An officer there got in touch with Ty by telephone. Although Ty had been shooting up drugs, he had managed to get to Longview, then had turned around, looking for Holly. Apparently Ty was stopped by an officer who contacted the police station where Holly was waiting. Ty spoke with Holly and told her to get directions from the police and to come on to Mauldin's house. (Tr. 738-45.)

Lewis was also the officer who retrieved the plastic bag containing the rings and some other items from Holly's purse. (Tr. 747.) Holly's statement was admitted as State's exhibit no. 137. (Tr. 751.)

Dr. C.B. Pinkerton, a physician with psychiatry experience, was only witness called by the defense. He testified that individuals who suffer from post traumatic stress disorders would not necessarily express emotion or visible signs of distress. (Tr. 761-765.)

The parties rested, closing arguments were given, and at approximately noon on September 19, 1988, the jury was instructed and retired for deliberations. (O.R. 494; Tr. 844-

845.) During deliberations, the jury sent two questions to the trial judge. Question No. 1 reads as follows:

> If Holly had nothing to do with the actual killings of her dad, mother and sister, but consented to the disposing of the bodies, the cleaning up, putting the baby in the bag, packing and leaving -- not reporting Ty when they were separated -- does this constitute abiding [sic] & abetting?

(O.R. 486.) The Court responded by stating to the jury, "You have the instructions of law to apply to the facts of this case. I'm not allowed to answer this specific questions." Counsel for Petitioner objected and moved the Court for a directed verdict based on the question submitted by the jurors. The objection was overruled and the motion denied. (Tr. 847-848.) The Court subsequently addressed the second question which reads as follows:

> Aiding and abetting is it before and during or after or all in combination. Sheets 27 and 32 condicts [sic] itself.

(O.R. 485.) After a hearing in chambers, the Court's response was "aiding and abetting is used in Instruction 32 and it refers to 'before and/or during' the commission of a crime. The terms 'aid and abet' are defined in Instruction 32 and Instruction 35. Accomplice as used in Instruction 27 is part [of] a group of instructions beginning with Instruction 24 that deals with accomplice's testimony. All objections were overruled by the Court. (Tr. 849-850.)

Close to midnight, the jury announced in open court it was deadlocked. The Court directed the jury to return to

the jury room and to continue deliberations. (O.R. 494; Tr. 851-852.) At 1:50 a.m. on the morning of September 20, 1988, after more than twelve hours, the jury returned a verdict of not guilty on Counts I and II but found Petitioner guilty of first-degree murder in the death of Crete Wingfield. After the verdict was announced, counsel for Petitioner moved for judgment, n.o.v. as to Count 3. The Court overruled the motion, and on November 18, 1988, Petitioner was sentenced to life imprisonment and judgment was entered.

II. ANALYSIS

A. Sufficiency of the Evidence

"Sufficiency of the evidence can be considered to be a mixed question of law and fact" to be reviewed *de novo*. Case v. Mondragon, 887 F.2d 1388, 1392, 1393 (10th Cir. 1989). This Court reviews such a claim to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have been found the essential elements of crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); see also Messer. v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996). "Such review is 'sharply limited' and a court 'faced with a record of historical facts that supports the conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Messer, 74 F.3d at 1013 (quoting Wright v. West, 505 U.S. 277, 296-97 (1992)). The Court must not weigh conflicting evidence or consider witness credibility. United State v. David, 965 F.2d 804, 811 (10th Cir. 1992), cert denied, 113 S.Ct. 1255 (1993). Instead the Court must view the evidence in the light most

favorable to the prosecution, Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1484, 1487 (10th Cir. 1993). However, "[t]o be sufficient, the evidence supporting the conviction must be substantial; that it, it must do more than raise a mere suspicion of guilt." Beachum v. Tansy, 903 F.2d 1321, 1332 (10th Cir.), cert denied, 498 U.S. 904 (1990).[3]

The above standard is rigorous. As the Supreme Court recently has reiterated, "the writ of habeas corpus has historically been regarded as an extraordinary remedy." Brecht v. Abrahamson, 113 S.Ct. 1710, 1919 (1993). Nevertheless, the writ remains a remedy, "a bulwark against convictions that violate fundamental fairness." Id. (quoting Engle v. Issac, 456 U.S. 107 (1982)).

Although this Court must apply a federal constitutional standard to determine whether the State presented sufficient evidence, the Court must look to Oklahoma law for the elements the State must prove in order to convict Petitioner of first-degree murder. See Jackson, 443 U.S. at 324 n. 16. The Oklahoma statute governing murder in the first degree provides:

> A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another

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[3] The State asserts that the State court's findings of fact on the sufficiency issue are entitled to a presumption of corrections. Sumner v. Mata, 455 U.S. 591, 597 (1982). While the above legal proposition is correct, the Court of Criminal Appeals made no factual findings which would be entitled to deference in this habeas corpus action. As noted above, the decision of the Court of Criminal Appeals was a summary opinion which included no findings of facts or legal conclusions.

> human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

21 O.S. 1991, §701.7(A); see also Ellis v. State, 834 P.2d 985 (Okla.Crim.App.), *cert. denied*, 113 S.Ct. 472 (1992).

In order for Petitioner to be convicted a principal in Crete Wingfield's murder, the State had to establish that she aided and abetted Ty in its commission. Spears v. State, 900 P.2d 431, 437 (Okla.Crim.App. 1995); 21 O.S. 1991, §172.[4] In Johnson v. State, 928 P.2d 309, 315 (Okla.Crim.App. 1996), the Court of Criminal Appeals specified that in a malice murder case, such as this one, the State must prove (1) that the defendant personally intended the victim's death, and (2) that the defendant aided and abetted with full knowledge of the companion's intent to kill the victim. See also Cannon v. State, 904 P.2d 89, 100-102 (Okla.Crim.App. 1995).

"Aiding and abetting' involves acts, words or gestures encouraging the commission of the offense, either before or at the time of the of offense." VanWoundenberg v. State, 720 P.2d 328, 333 (Okla.Crim.App. 1986)(emphasis added). In Anglin v. State, 224 P.2d 272, 275 (Okla.Crim.App. 1950), the Court of Criminal Appeals stated:

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[4] Section 172 reads as follows:
All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constitution the offense, or aid and abet in its commission, though not present are principals.

> It is not necessary, however, that he do some act at the time in order to constitute him a principal, but he must encourage its commission by acts or gestures, either before or at the time of the commission of the offense, with full knowledge of the intent of the persons who commit the offense. The mere concurrence of the minds of persons in pursuance of a previously formed design to commit a crime does not alone constitute them principals. To constitute a principal in crime, there must be participatory or the doing of some act at the time of the commission of the crime which is in furtherance of the common design.

See also Sanders/Miller v. Logan, 710 F.2d 645, 651 (10th Cir. 1983) (holding that to uphold a conviction for first-degree murder as an aider and abettor, there must be evidence that defendant participated in the crime with full knowledge of co-defendant's intent to kill the victim).

In Turner v. State, 477 P.2d 76, 83 (Okla.Crim.App. 1970), the court noted that the law which governs aiding and abetting was well stated in two very early cases; Hubbard v. State, 112 P.2d 174 (Okla.Crim.App. 1941), and Moore v. State, 111 P. 822 (Okla.Crim.App. 1910).

> "[T]o be concerned in the commission of a crime as a principal, one must either commit the crime himself, or procure it to be done, or aid or assist, abet, advise, or encourage its commission. A mere mental assent to or acquiescence or advise its perpetration, who takes no part therein, gives no counsel and

> utters no word of encouragement to the perpetrator, however, wrong morally, doe snot in law constitute such person a participant in the crime.

Turner, 477 P.2d at 83.

It is clearly not the law that one can be guilty of murder without some overt act on the part of the would-be aider/abettor. It is well-established that more than one's presence, more than knowing of the crime or knowing that the offense was being committed is necessary. It is not sufficient to show that the would-be aider/abettor was present and knew the offense was being committed. The proof must go further, and show, beyond a reasonable doubt, that, in this case, Petitioner personally intended Crete's death, and that Petitioner participate in the homicide before or at the times of its commission with the full knowledge of Ty's intent to kill Crete.

Unlike the typical aiding and abetting factual scenario, this case offers no evidence that Petitioner knowingly and intentionally intended the death of Crete. Cf. Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law §6.7, at 139 (1986) (discussing the "easier" class of cases "in which the liability of the accomplice is based upon the fact that he actually did 'aid," or 'assist' in the commission of the crime") [hereinafter LaFave & Scott]. Petitioner did not give Ty the shotgun, did not encourage him to shoot, or in any other obvious way assist him in shooting Crete. It is thus difficult to see how Petitioner could have had the requisite intent. Cf id §6.7, at 138 ("one does not [generally] become an accomplice by refusing to intervene in the commission of a crime...[and so] courts have experienced considerable difficulty in cases where the

defendant was present at the time of the crime and the circumstances of his presence suggest that he might be there pursuant to a prior agreement to give aid if needed").

It was the court in Crabtree v. State, 193 P.1005 (Okla.Crim.App. 1920), who first concluded that "no one can be properly convicted of a crime that he did not commit, or to the commission of which he has never expressly or impliedly given his assent." While Ty may have ultimately told Petitioner that he would have to kill Crete, the record is devoid of any evidence showing that Petitioner harbored the same intent. As it has been said in the context of federal prosecution: "[T]he most important element [of aiding and abetting] is the sharing of the criminal intent of the principal...". U.S. v. Grey Bear, 838 F.2d 1286, 1292 (8th Cir. 1987) vacated in part on other grounds on reh'g en banc, 863 F.2d 572 (8th Cir. 1988), *cert denied*, 110 S.Ct. 846 (1990); see also U.S. v. Andrews, 75 F.3d 552, 555 (9th Cir. 1996); Campbell v. Fair, 838 F.2d 1, 4 (1st Cir. 1988). At trial the State did not introduce any direct or circumstantial evidence that Petitioner had any animosity toward Crete or that Ty and Petitioner had a pre-arranged plan to kill Crete. Rather Ty admitted that at the time he shot his father he had not planned to kill Crete. Moreover, the evidence shows that when Ty informed Petitioner that he would have to kill Crete, Petitioner objected and specifically told Ty not to kill the little one. "He had told me he was going to kill Crete, too, and I didn't want him to." [Stmt. p.2; see also Tr. 736]

It is axiomatic that a jury may infer criminal intent from actions, but in this case the State's evidence goes solely to one prong of the test described by the Oklahoma Court of Criminal Appeals in Johnson, i.e., aiding and abetting with knowledge of the intent of the perpetrator. 928 P.2d at 315.

To hold that a jury may infer the second prong, that the aider and abetter personally intended the death of the victim, from the evidence of the first, effectively collapses the two prongs into one. The general intent to facilitate a crime and the specific intent to facilitate first-degree murder are distinct.

"To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to [her] state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first-degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless [s]he acted with premeditation and deliberation." LaFave & Scott, §6.7, at 144-45 (footnotes omitted). Immediately prior to Crete's murder, the Petitioner removed Crete from the violence in the bedroom and took her into the living room, eventually taking her to the kitchen to see if she was hungry or wanted some juice. Such acts of comfort and reassurance, and the removal of her little sister from obvious danger, seem to negate any inference of premeditation or deliberation on the part of Petitioner concerning Crete's death. No evidence was offered of any animosity by Petitioner toward Crete at any time. Arguably, the State may have presented sufficient evidence to properly convict Petitioner of some lesser offense, but the jury was not given this option. The evidence of the crime charged was not sufficient. See Commonwealth v. Hartley, 621 A.2d 1023 (Pa. 1993) (accomplice to first-degree murder had to have the "willful, deliberate, and premeditated specific intent to kill at the time of the killing" in order to be convicted).

The Court in Turner v. State, 477 P.2d 76 (Okla.Crim.App. 1970), addressed this issue of an

aider/abettor's intent to kill. There, Ernest Moore, Billy Morgan, and Doyle Turner were charged with the murder of John Elder. Ernest Moore was tried before a jury and was acquitted; Billy Morgan was granted immunity from prosecution in exchange for his testimony; and Doyle Turner was convicted of aiding and abetting first-degree murder and given life imprisonment. After reviewing Turner's appeal, the court held that the evidence did not support Turner's aiding and abetting conviction.

In Turner the victim, John Elder, was approached by Turner outside a tavern East of Talihina. Turner told him that co-defendant Moore wanted to see him at the back of the building. Morgan then approached and told the victim that he was still mad at him for having been whipped by him earlier in the week. Moore joined the group, took the victim by the arm and the four men walked toward the back of the building. The State's evidence of what occurred after the four men went behind the building and later than night was presented through the testimony of co-defendant Morgan. He testified that he, Moore and Turner took the victim from the tavern in a borrowed pickup, that he and the victim had a short scuffle until Moore stepped in and struck the victim several times, knocking him down three times. Thereafter all four men got back in the truck and began driving back toward the tavern when the truck stalled. The victim attempted to run away, but Moore and Turner brought him to the pick-up. Then Morgan and Turner left to get some gasoline. Morgan testified that the victim was alive at the time they left. When they returned, Moore told Morgan and Turner that the victim was dead. Turner helped get the victim back into the pickup, and the body was taken to Turner's residence. Turner and Moore then returned to the tavern and brought the victim's car to Turner's home. Some

of the victim's clothes were found in a shallow grave about 300 yards from Turner's residence.

The Court of Criminal Appeals held the evidence was insufficient to justify the conviction of Turner as an aider and abettor. Turner, 477 P.2d 76, 80-84. The Court stated:

> There is no proof of a conspiracy or pre-arranged plan between defendant and either of the co-defendants to murder, or kill, or even do bodily harm to any person. No words spoken or moves made to indicate malice, or intention to harm, and above all--no participation by this defendant in any way to aid or abet or even assist either of the co-defendants in their action.

Id at 84.

The State of Oklahoma insists that the circumstantial evidence sufficiently supports the jury's inference that Petitioner had the requisite intent to kill Crete. The State asserts that Petitioner's "hatred toward her parents lends credence to the fact that the Petitioner harbored a premeditated and deliberate intent to kill Crete and that she aided her brother in killing Crete." (Response, Docket #12, at 7). The States relies on Ty's testimony that, prior to the murders, Petitioner had mentioned killing their parents on several occasions. (Id.) The State also relies on Ms. Mauldin's testimony that Petitioner was not close to her stepmother, Louise, and that one time Petition told her she hated Louise and did not like her father. (Id.)

The issue in this case is the murder of Crete and not the murders of Louise and Clint Wingfield. Therefore, the

Court finds irrelevant and illogical the State's contention that Petitioner's intent to kill Crete Wingfield can be inferred from whatever animosity there may have been towards her parents.

Next the State contends that Petitioner participated in the murder of Crete by telling Crete "to go to Ty" knowing that he would kill her. Although the State also draws from Petitioner's statement, it is the testimony of Sally Randall, Petitioner's cousin who visited Petitioner at the Rogers County Jail, that is particularly significant. Ms. Randall testified on direct examination that she asked Petitioner what she had done; that Petitioner replied that when Ty called Crete, she told Crete "to go to Ty." The State asserts this testimony is an admission by Petitioner, knowing that Ty would kill Crete, and is evidence of Petitioner's premeditated intent to kill. However, a review of Petitioner's statement implies Crete went to Ty on her own when Ty called her name. ("So he called out from the bedroom and said, 'Crete, come here.' She (Crete) went to Ty." (Stmt. at 2; Tr. 736)

Reviewing the evidence in the light most favorable to the State, and taking the testimony of Ms. Randall as true, there is still no evidence of "malice aforethought." It was Ty who first decided something had to be done to Crete; it was Ty who got the gun; it was Ty who had the intent to kill Crete; and it was Ty who ultimately pulled the trigger. Petitioner admitted Ty had told her he was going to kill Crete, but even Ty testified that he had said he would have to kill Crete "or sell her." (Tr. 662) There was still uncertainty. There was no plan or scheme or design. And there is certainly no proof beyond a reasonable doubt that Petitioner "conspired in the commission of the homicide before its perpetration." Moulton v. State, 201 P.2d 268, 269 (Okla.Crim.App. 1948). Petitioner's own words when

she heard the shot, "I figured ..." (Ty had shot Crete), imply she was uncertain of Crete's fate even then. Petitioner had begged Ty not to kill Crete. (Tr. 676) At least on Petitioner's part, there was still that glimmer of hope, no matter how small, that Ty would not kill Crete.

The only evidence cited by the State which occurred prior to or contemporaneously with the shooting of Crete is Petitioner's failure to prevent the murder of Crete. The State contends that Petitioner could have dissuaded Ty from shooting Crete or at least run out of the house with Crete in order to save her. Notwithstanding the fact that the Wingfields lived in rural Craig County, that no neighbors lived close by, that Petitioner was scared and possibly in shock, or that the killings all occurred in a short span of time [See M.Tr. 29; P.Tr. 23], it would be no more than speculation that Petitioner could have escaped or convinced Ty not to kill Crete. At best, the State's evidence has only presented a suspicion of guilt which is an inadequate basis for conviction.

Furthermore, there is no legal duty for Petitioner to protect her sister. While there are some cases in which the mother or father has a legal obligation to care for or look after the welfare of a child, the Court is unaware of any cases in which there was a duty imposed upon a sibling to protect another sibling, especially when to do so would endanger her own life.[5]

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[5] See Knox v. Commonwealth, 735 S.W. 2d 711 (S.Ct.Ky. 1987)(mother of child had no legal duty to make effort to prevent rape of her daughter by her husband, and thus mother could not be convicted of complicity to commit first-degree rape of her daughter); also Pope v. State, 396 A.2d 1054 (Ma.APP. 1979)(evidence was insufficient to prove that defendant was guilty of child abuse as a principal in the second

"It is plainly not the law that one can be guilty of murder, without overt act, who by neither word nor gesture has done anything to contribute to the commission of the homicide, or to assist, encourage, or evince approval of it at or before the fact, and of whom it only appears that [s]he was present, knew of the crime, and even may have mentally approved of it. The silent thought, however wicked in view of the Searcher of Hearts, is not a crime against our laws, but is left by them to another than a human tribunal." Anderson v. State, 91 P.2d 794, 798 (Okla.Crim.App. 1939). Although Petitioner may have had a strong moral obligation to help the child, she was under no legal duty to do so. Petitioner's lack of action, whether from fear or some other reason, or speculation that Petitioner could have saved the life of Crete do not meet the statutory definition of 'aiding and abetting.'

Additionally, as further support for its theory that Petitioner aided and abetted, the State relies on Ty's testimony that Petitioner helped him load the bodies on the truck, and that Petitioner herself placed Crete's body into a plastic bag. Petitioner also helped clean up some of the blood in the house, wrote two checks, and followed Ty to Texas. This evidence, however, is after the fact. See Turner, 477 P.2d 76, 80-84 (in determining whether defendant aided and abetted in the murder of the victim, the Court ignored the fact that defendant helped load the victim's body on the truck and drove the victim's car to his house, and that remains of the victim's clothing were located in a

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degree; Court noted that defendant neither aided the mother in the acts of abuse nor did she counsel, command and encourage her; fact that defendant failed to intervene to help the baby during abuse was not within the reach of the child abuse statute).

shallow grave near defendants' house). Aiding and abetting is only prior to and during the commission of the crime.

Whatever Petitioner did after the commission of the murders is not sufficient to convict her of aiding and abetting the murder of Crete. Even the jury was confused about the application of the law to the evidence of what Petitioner did after the commission of the murders. "If Holly had nothing at all to do with the actual killing of her dad, mother and sister, but consented to the disposing of the bodies, the cleaning up, putting the baby in the bag, packaging and leaving -- not reporting Ty when they were separated --does this constitute abiding [sic] & abetting?" (O.R. 486; Tr. 847-848)

Lastly, the State relies on Petitioner's demeanor and failure to show any emotion after the killing. Again, the Court notes that according to the statutes and Oklahoma case law, it is the commission by acts or gestures, either before or at the time of the crime which determines whether an individual is aiding and abetting the commission of a crime. Clearly, the evidence presented of Petitioner's emotional state after the killings could not be relevant as an "overt act" or "encouragement." Even assuming the State is correct, the evidence indicates that her failure to show emotion was consistent with other signs of shock: she asked the neighbor specifically how to clean blood off her shoes; she poured bleach on the floors and attempted to vacuum it; she got lost in Texas and went to the police station where she gave a description of her brother, the vehicle he was driving and asked for assistance in locating him; she arrived at the Mauldin's house and exited the van, leaving it running without putting it in park; she sat idly in a swing and talked with Wendy Mauldin; she asked Mrs. Mauldin to call the school to tell them she couldn't be there because she was

worried about her assignments. Those actions are certainly not actions of someone who is thinking clearly.

B. Retroactivity of Habeas Corpus Amendments

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214 ["the 1996 Act"], was signed by the President on April 24, 1996, twenty-one days after the filing of this habeas corpus action. The 1996 Act redesignates the former § 2254(d), which deals with state courts' findings of fact, as § 2254(e). Section 104 of the new statute adds a new § 2254(d) that for the first time specifies the appropriate treatment of legal determinations by state courts. Section 2254(d), as amended, provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court has established that "a statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." Landgraf v. USI Film Products, 114 S.Ct. 1483, 1499 (1994)(citation and footnote omitted). The Fifth Circuit and Seventh Circuit Courts of Appeals have held that while Congress did not specify that it intended to apply section 2254(d)(1) retrospectively, section 2254(d)(1) does not attach new consequences to pending petitions for habeas corpus. Drinkard v. Johnson, 97 F.3d 751, 765 (5th Cir. 1996); Lindh v. Murphy, 96 F.3d 856, 863 (7th Cir. 1996); but see Boria v. Keene, 90 F.3d 36, 37 (2d Cir. 1996)(determining with no analysis that the 1996 Act would require a different outcome in the case). The Tenth Circuit has not reached this issue except in passing in Edens v. Hannigan, 87 F.3d 1109, 1112 n. 1 (10th Cir. 1996).

Even applying section 2254(d), as amended, to the instant case, this Court's decision would remain unaffected. Reasonable jurists considering the sufficiency of the evidence in this case would conclude that the state court summary opinion was contrary to clearly established U.S. Supreme Court precedent.[6] See Drinkard, 97 F.3d at 768. Jackson v. Virginia, 443 U.S. 307 (1979), has been the seminal case in sufficiency of evidence cases for more than fifteen years. Further, relief is appropriate under 2254(d)(2) as this Court

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[6] This Court questions whether the summary opinion of the Oklahoma Court of Criminal Appeals is even entitled to the deferential standard of review set out in section 2254(d), as amended by the 1996 Act. The Court of Criminal Appeals merely stated that Petitioner's conviction was affirmed and did not explain how it applied the law to the facts of the case.

concludes the state court decision was based on an unreasonable determination of the facts. Petitioner, therefore, is entitled to habeas relief under section 2254(d) as amended by the 1996 Act as well as under the pre-amendment standard of review.

III. CONCLUSION

Viewing the evidence in the light most favorable to the prosecution, the Court finds there is insufficient evidence to find Petitioner Holly Grace Wingfield guilty of first-degree murder for aiding and abetting the death of Crete Wingfield. While it may be true there is conflicting evidence on some facts, in particular, the testimony of Ty Wingfield, nevertheless there is no evidence liking Petitioner to a plan to murder Crete. There is no evidence of premeditation or harboring an intent to kill Crete. Instead, the evidence reveals that Petitioner wanted to protect Crete from the moment Ty shot his father. Petitioner grabbed Crete and ran to the living room, then to the kitchen where she tried to comfort Crete. When Ty told Petitioner he was going to kill Crete, she begged him not to kill the child. Even taking Ms. Randall's comments as true, there is still no evidence of a plan or scheme to kill Crete. The Court concludes from the jury's questions and the State's argument that the verdict of the jury may well have been based on the fact Petitioner did nothing to save Crete's life. This, however, morally wrong does not constitute first degree murder under Oklahoma law.

After careful study of the trial record, the original State court record, the preliminary hearing transcript, the motion transcript, the deposition and statements of the parties in this case, the Court finds that the evidence of Petitioner's guilt of the murder of Crete Wingfield was

constitutionally insufficient, and thus, that Petitioner is in custody in violation of the Due Process Clause of the Fourteenth Amendment.

Once this Court finds the evidence insufficient under the Constitution of the United States, the Double Jeopardy Clause bars the retrial of Petitioner and, therefore, entitles her to immediate release. See Fagan v. Washington, 942 F.2d 1155, 1157 (7th Cir. 1991); Young v. Kemp, 760 F.2d 1097, 1105 n. 9 (11th Cir. 1985).

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus (Docket #1) is GRANTED. The motion for oral argument (Docket #14) is DENIED.

SO ORDERED THIS 7th day of February, 1997.

s/Terry C. Kern
TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT